No. 92-357

In the

Supreme Court of the United States

October Term, 1992

Ruth O. Shaw, *et al.*,
Appellants,

v.

William Barr, *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Does the state legislature's drawing of two congressional districts with majority-minority populations violate the fourteenth and fifteenth amendment rights of white voters?

2. Does article I, section 2 extend beyond equal population to proscribe the drawing of congressional districts on a race-conscious basis?

3. Is a state's authority under article I, section 4 to create congressional districts subject to override by Congress?

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MOTION TO AFFIRM

The state appellees[1] move the Court to affirm the judgment of the three-judge United States District Court for the Eastern District of North Carolina on the grounds that the

[1] The state appellees are elected and appointed officials with responsibilities for the drawing of congressional districts and the conduct of elections in the State of North Carolina. The federal appellees are the Attorney General of the United States and the Assistant Attorney General of the United States in charge of the Civil Rights Division of the United States Department of Justice. The federal appellees are filing concurrently a separate motion to affirm the three-judge court's decision dismissing appellants' claims against them. The state appellees' motion will only address the questions presented relating to appellants' claims against the state appellees.

questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

In this appeal, appellants seek review of the order of a three-judge court dismissing their complaint against the state appellees under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Appellants are white voters, two of whom reside in a newly-created majority-minority congressional district.[2] Their complaint challenges the congressional redistricting plan enacted by the General Assembly of North Carolina, effective for the 1992 primaries and elections, alleging that the actions of the state defendants in creating two congressional districts with majority-minority populations for the purpose of obtaining preclearance by the federal defendants under the Voting Rights Act[3] constitute an unconstitutional racial gerrymander in violation of article I, sections 2 and 4, and the Fourteenth and Fifteenth Amendments.[4]

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[2] The term "majority-minority," as used herein in reference to congressional districts, refers to districts in which a majority of the registered voters and the voting age population are members of a racial minority.

[3] 42 U.S.C. § 1973 *et seq.*

[4] Although the complaint is styled as including a motion for preliminary and permanent injunction and for temporary restraining order, appellants never sought temporary or preliminary injunctive relief prior to dismissal of the action by the three-judge court.

The basic history of North Carolina's congressional redistricting is accurately related in appellants' complaint and jurisdictional statement. North Carolina's original redistricting plan, which contained eleven majority-white districts and one majority-black district, was submitted to the United States Department of Justice for preclearance pursuant to § 5 of the Voting Rights Act. On December 18, 1991, the federal appellees interposed an objection to the plan, essentially questioning the legislature's failure to draw a second majority-minority district. Complaint ¶ 16, J.S. App. at 79a.[5] In response to the objection, the General Assembly enacted a second redistricting plan, Chapter 7 (1991 Extra Session), which created two districts with majority-black populations. This plan was precleared by the federal appellees and is the subject of the complaint. Complaint ¶¶ 17-18, J.S. App. at 80a-81a.

In addition to ascribing constitutional violations to the federal appellees because of their objection to the state's original redistricting plan, appellants allege repeatedly in their complaint that the state appellees were coerced into enacting an unconstitutional redistricting plan. *See* Complaint, J.S. App. at 68a-71a, 80a-81a, 86a-88a, 92a-94a. According to the appellants, by acquiescing in the creation of congressional districts intended to concentrate voters of a particular race and to elect members of Congress of a particular race, the General Assembly of North Carolina

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[5] Citations herein to "J.S. App. at ___" refer to the Jurisdictional Statement Appendix. The text of the Jurisdictional Statement is referenced as "J.S. at pp. ___."

became an unwilling, but necessary, participant in creating a racially discriminatory voting process for the election of members of Congress from North Carolina. Complaint ¶ 36, J.S. App. at 93a-94a.

After motions to dismiss with supporting memoranda were filed by the state and federal appellees, appellants attempted to bolster their claim by amending their complaint and adding conclusory allegations of discriminatory intent and purpose by the state appellees. J.S. App. at 102a-104a. At the conclusion of the hearing on the dismissal motions, appellants' complaint, as amended, was dismissed by the three-judge court, one judge concurring in part and dissenting in part, for failure to state a claim.

ARGUMENT

The case presents no substantial question not previously decided by this court. For the reasons stated below the district court's decision should be summarily affirmed.

I. THE DRAWING OF TWO MAJORITY-MINORITY CONGRESSIONAL DISTRICTS DOES NOT VIOLATE THE FOURTEENTH AND FIFTEENTH AMENDMENT RIGHTS OF WHITE VOTERS.

Appellants seek to persuade this Court that their rights as voters have been violated under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment solely because the North Carolina General Assembly consciously adopted a congressional redistricting

plan in which black voters comprise a majority of the registered voters in two of the state's twelve congressional districts. Their claim takes two forms.[6] They first contend that the Constitution absolutely forbids race-consciousness in the drawing of congressional district lines and that appellants, white voters, have therefore been denied their constitutional rights by the drawing of the two majority-minority districts. Secondly, they contend that their rights are violated by the state's adoption of majority-minority districts when the districts are drawn, as they assert North Carolina's were, with no regard for principles of compactness, contiguity and communities of interest, to achieve proportional representation of minorities in order to obtain preclearance under § 5 of the Voting Rights Act.

Appellants' theory can only succeed if the Court invalidates the Voting Rights Act or renders it virtually meaningless by interpretation. Moreover, appellants ask this Court to overrule or ignore direct precedent as well as the teachings of numerous cases decided under the Fourteenth and Fifteenth Amendments. Appellants have suggested no coherent reason for the Court either to repudiate or rewrite the extensive body of law developed under the Fourteenth and Fifteenth Amendments and the Voting Rights Act. Appellants' claims should be rejected and the district court's judgment summarily affirmed.

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[6] The district court distilled appellants' somewhat amorphous and confusing equal protection and fifteenth amendment allegations and arguments into two forms. *See* J.S. App. at 13a, 18a, 21a. The state appellees here follow that approach in the interest of clarity.

A. Race-Conscious Districting Is Not *Per Se* Unconstitutional.

1. Appellants' Claim Challenges the Validity of the Voting Rights Act.

Appellants base their case broadly on their contention that the Constitution unequivocally prohibits congressional districts drawn with regard to race. Complaint ¶¶ 28, 29, 35, J.S. App. at 88a-90a, 93a. Their notion that the Constitution can never permit the deliberate creation of majority-minority districts squarely tests the validity of the Voting Rights Act, both § 2 and § 5.[7] Indeed, appellants baldly assert that the Voting Rights Act "neither requires not [sic] authorizes the creation of majority-minority districts." J.S. at p. 33. Yet, that is exactly what the Voting Rights Act does require at times. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986); *see also, Garza v. County of Los Angeles*, 918 F.2d 763, 776 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 681 (1991) (commenting, in response to a county's reverse discrimination argument, that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes").

The Voting Rights Act forbids states to implement districting plans with certain harmful consequences to minorities, both intentional and unintentional. The only way a state can ensure that it complies with the § 2 and § 5 prohibitions against harming racial minorities in the redistricting process

[7] While all one hundred of North Carolina's counties are subject to § 2 of the Act, only forty are subject to § 5 preclearance requirements.

is by consciously considering the effects on minorities of any plan it contemplates adopting. The Voting Rights Act thus *requires* a conscientious legislator to take race into account in making redistricting decisions. Unless the Court strikes down the Act, appellants' contention that a state must draw congressional districts without any regard to race fails to state a claim for relief.

2. Appellants' Claim Is Squarely Foreclosed by Precedent.

In arguing that the Constitution flatly forbids race-conscious redistricting, appellants are following a trail closed off long ago by this Court's decision in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) ("*UJO*"). The plaintiffs in *UJO*, like appellants here, appealed the granting of a motion to dismiss their complaint for failure to state a claim for relief. Espousing a theory strikingly similar to that of appellants, the *UJO* plaintiffs contended that their fourteenth and fifteenth amendment rights were violated by New York's deliberate creation of majority-minority districts in order to gain § 5 preclearance of their legislative redistricting plan. In the plurality opinion, Justice White described the plaintiffs' arguments as follows:

> first, that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here

> of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional. . . .

UJO, 430 U.S. at 156. Various members of the Court expressed different reasons for rejecting the sweeping claim that race-conscious redistricting is never constitutionally permissible, but seven of eight participating Justices did indeed reject it. *See* opinion of Justice White, *id.* at 161, joined by Justices Stevens, Brennan, and Blackmun ("neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment"); opinion of Justice White, *id.* at 165, joined by Justice Stevens and then-Associate Justice Rehnquist (regardless of whether New York's action was dictated by § 5 of the Voting Rights Act, drawing race-conscious districts does not violate the Fourteenth and Fifteenth Amendments in the absence of an unconstitutionally discriminatory purpose and unconstitutional fencing out of white voters or minimizing or unfairly cancelling out white voting strength); opinion of Justice Stewart, joined by Justice Powell, *id.* at 179-180 (no showing that plan had purpose or "effect of discriminating against them on the basis of their race").

3. *UJO* Should Not Be Overruled.

Appellants seek to escape *UJO*'s barrier to their claim by urging a "need for this Court to answer the questions posed here as to that decision's continuing viability. . . ." J.S. at p. 17. They argued below, and argue here, that *UJO* "is out of step with this Court's more recent jurisprudence," J.S. at p. 30, relying on cases such as *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) ("*Croson*"); and *Freeman v. Pitts*, ___ U.S. ___, 112 S. Ct. 1430 (1992).[8] In so doing, they ignore two critical factors which compel continued adherence to *UJO*.

First, Congress has broad powers under section 2 of the Fifteenth Amendment to fashion legislation designed to ensure that citizens are not deprived of an equal right to vote based on race. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *UJO*, 430 U.S. at 156-57. In exercising this power, Congress may prohibit conduct which would *not* violate the first section of the amendment. *City of Rome v. United States*, 446 U.S. 156, 176 (1980). It is this broad remedial authority of Congress which underlies the Voting Rights Act and distinguishes the race-consciousness compelled by its

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[8] Contrary to appellants' argument, *Powers v. Ohio*, 111 S. Ct. 1364, dealing with racially-motivated juror challenges, and *Freeman v. Pitts*, 112 S. Ct. 1430, dealing with state school desegregation decisions, provide no insight into the issue raised by appellants, as noted by the majority opinion in the district court. *See* J.S. App. at 20a. Judge Voorhees, who dissented in part, concurred in this part of the majority's opinion, rejecting appellants' claim that race-conscious redistricting is *per se* unconstitutional. J.S. App. at 27a, 30a, 60a.

strictures from the racial classifications rejected by the Court in other cases. This distinction is vividly illustrated by comparing *Croson*, which held unconstitutional a municipal plan for minority set-asides in construction contracts, with *Fullilove v. Klutznick*, 448 U.S. 448 (1980) ("*Fullilove*"), which upheld a congressional mandate for minority set-asides in highway construction contracts. Indeed, *Fullilove* was specifically reaffirmed in *Croson* in recognition of the broad remedial powers of Congress under section 5 of the Fourteenth Amendment that parallel its sweeping authority under section 2 of the Fifteenth Amendment. 488 U.S. at 490-91 (plurality opinion); *id.* at 521-22 (Scalia, J., concurring); *see also id.* at 532-33, citing *Fullilove* with approval (Marshall, J., dissenting, joined by Justices Brennan and Blackmun). In fact, the Court has recently reaffirmed the broad *remedial* purpose underlying the Voting Rights Act and adhered to prior statements that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer*, 501 U.S. ___, ___, 111 S. Ct. 2354, 2368 (1991). Appellants' notion of color-blind redistricting, in which all race-consciousness in the drawing of districts is unconstitutional *per se*, would jettison the Voting Rights Act and would repudiate the exercise by Congress of the broad authority granted to it in section 2 of the Fifteenth Amendment.

Secondly, there is in reality no textual support in the Court's opinions for the notion that *UJO* has been fatally undercut by the Court's later decisions dealing with express racial classifications in other areas. Indeed, the Court recently relied on *UJO* in explaining why it upheld certain

minority preference policies of the Federal Communications Commission against an equal protection challenge. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547, ___, 110 S. Ct. 2997, 3019 (1990). In *Metro Broadcasting*, the Court expressly reaffirmed that "a State subject to § 5 . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5.'" *Id.* 110 S. Ct. 3019. The dissent in *Metro Broadcasting*, furthermore, casts no doubt upon the continued validity of *UJO*. Justice O'Connor (the author of the *Metro Broadcasting* dissent) has expressly endorsed the Court's prior decisions in *UJO* and other cases permitting states "to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). The reasoning and result in *UJO* are thus fully consistent with the well-developed body of case law under the Equal Protection Clause and the Fifteenth Amendment as well as the Voting Rights Act.

The Voting Rights Act, and the large body of case law interpreting and applying it, have "engendered substantial reliance and . . . become part of the basic framework" of our entire electoral and districting process. *Quill Corp. v. North Dakota by and through Heitkamp*, ____ U.S. ___, ___, 112 S. Ct. 1904, 1916 (1992). Thus, "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* . . . counsels adherence to settled precedent." *Id.* (citation omitted). Appellants argue for a radical departure from settled law which would upset more

than a quarter-century of redistricting and voting rights law on which voters, legislative bodies, and the courts have relied. Appellants' generalized statements about racial gerrymandering and citations to cases of little relevance offer this Court no compelling reason, indeed no reason at all, to sweep aside this voluminous body of law and revolutionize the legislative, political, and jurisprudential basis of redistricting. The Court should not, indeed must not, entertain appellants' plea that it declare race-conscious redistricting *per se* unconstitutional even when undertaken in response to a governmental body's obligations under the Voting Rights Act.

B. APPELLANTS FAILED TO ALLEGE A RACIALLY DISCRIMINATORY PURPOSE OR EFFECT UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

Appellants contend, alternatively, that the creation of majority-minority districts constitutes unconstitutional racial gerrymandering under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment when the districts are drawn, as they assert North Carolina's were, with no regard for principles of compactness, contiguity, or communities of interest in an effort to achieve proportional representation for minorities. J.S. at pp. 3, 13, 22; Complaint ¶¶ 26-27, J.S. App. at 86a-88a; ¶¶ 34-36, J.S. App. at 92a-94a; ¶ 36(A), J.S. App. at 101a-104a. Appellants' racial gerrymandering claim fails to state a claim for relief under both the Fourteenth and Fifteenth Amendments because appellants allege neither a legally sufficient racially

discriminatory purpose nor a legally sufficient discriminatory effect under well-established principles of constitutional law.

1. Appellants Have Not Alleged Invidious Discriminatory Intent Under the Fourteenth and Fifteenth Amendments.

Appellants' equal protection and fifteenth amendment claims fail to allege the invidious racially discriminatory purpose essential to both claims. *See City of Mobile v. Bolden*, 446 U.S. 55, 62-63, 66-67 (1980); *see also, Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (Fourteenth Amendment); *UJO*, 430 U.S. at 165 (plurality opinion); *id.* at 179 (Stewart, J., with Powell, J., concurring). Appellants contend that North Carolina knowingly and intentionally adopted majority-minority districts and that knowingly and intentionally placing groups of voters in districts according to their race constitutes a discriminatory purpose for both amendments. This argument fails unless the Court elects to redefine dramatically the very concept of racially discriminatory purpose.

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (sex discrimination); *accord City of Mobile v. Bolden*, 446 U.S. at 71 n. 17 (plurality opinion) (race discrimination).

Appellants have not alleged, and could not allege, that North Carolina adopted majority-minority districts because of, not merely in spite of, their alleged effects upon white voters. They have not alleged, and could not allege, that the state appellees acted with the purpose of harming white voters. Instead, they alleged repeatedly that the state appellees acted as they did in order to satisfy requirements imposed by the federal appellees for preclearance of the congressional redistricting plan under § 5 of the Voting Rights Act. Complaint ¶¶ 17, 36, 37, J.S. App. at 80a-81a, 93a-94a.[9] As in *UJO*, "[t]he clear purpose with which the

[9] Appellants ridicule as a "Nuremberg defense" the idea that the state appellees lacked an invidious discriminatory purpose because they acted to meet the federal appellees' objection to the original plan and to obtain preclearance rather than to harm white voters. However, it is appellants who, throughout their complaint, characterized the process as one in which the federal appellees "coerced," "required," and "imposed on" the state appellees, who "submitted" and "acquiesced" to the federal appellees' requirements. *See generally*, Complaint, J.S. App. at 67a-105a. The state appellees do not, contrary to appellants' argument, rely on a "Nuremberg defense" that that they acted without volition because they were forced into drawing majority-minority districts. Instead, they rely on the obvious implication of appellants' own allegations, that the complaint fails to ascribe to the state appellees an invidious discriminatory intent or purpose. Nor can appellants avoid the consequences of their characterization of the process leading to adoption of the plan by adding to their complaint conclusory allegations that the state appellees had a racially discriminatory intent and purpose, as they have attempted to do. *See* Complaint ¶ 36(A), J.S. App. at 101a-104a.

. . . Legislature acted -- in response to the position of the United States Department of Justice under the Voting Rights Act -- forecloses any finding that it acted with the invidious purpose of discriminating against white voters." *UJO*, 430 U.S. at 180 (Stewart, J., concurring).

Appellants argue that the Court needs to decide whether the state appellees' alleged purpose of assuring that two minority persons would be elected from North Carolina to the United States Congress is "discriminatory" for equal protection purposes.[10] They are asking this Court to sweep away years of constitutional adjudication and redefine the standards for racial discrimination under the Fourteenth and Fifteenth Amendments.[11] If deliberate creation of minority districts standing alone constitutes a sufficient racially discriminatory intent, as appellants contend, then it is difficult to see how legislators can ever confidently draw

[10] The dissenting opinion in the district court suggests that appellants might have been able to show a discriminatory intent against particular groups of voters in specific areas of the state. J.S. App. at 41a-44a. This argument ignores the fundamental premise of appellants' lawsuit -- that the (coerced) drawing of the majority-minority districts is itself unconstitutional without regard to the placement of the districts. Significantly, appellants have not adopted or urged this theory in their Jurisdictional Statement.

[11] Appellants' theory, of course, would logically extend to cases other than those involving redistricting, particularly equal protection claims in which classifications are allegedly based on suspect criteria. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (alleged disproportionate impact of death penalty does not violate Equal Protection Clause in absence of showing that death penalty was enacted or maintained "*because of* an anticipated racially discriminatory effect."

districts in multi-racial areas. Legislators ordinarily know the likely political effects of the district lines they draw, *Davis v. Bandemer,* 478 U.S. 109, 128-29 (1986), and cannot be expected "simply to close their eyes to considerations such as race and national origin," *UJO*, 430 U.S. at 176 (Brennan, J., concurring). Even if redistricting lines were originally fashioned with no race-consciousness whatsoever, "it is most unlikely that the . . . impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973). Under the Court's established understanding of the concept of discriminatory intent, this type of unavoidable awareness of the racial effects of government action does not violate the Constitution unless it is coupled with an invidious intent to harm some identifiable racial group. *See Washington v. Davis,* 426 U.S. 229 (1976). Appellants' theory would convert claims of racial discrimination under the Equal Protection Clause and the Fifteenth Amendment into little more than questions of discriminatory impact, at least in the redistricting area. The Court should not accept appellants' request for it to review and redefine the invidious discriminatory intent necessary for racial discrimination under the Equal Protection Clause and the Fifteenth Amendment.

2. Appellants Have Not Alleged A Racially Discriminatory Impact Under the Fourteenth and Fifteenth Amendments.

Appellants' claim is also fatally defective because they have not alleged, and could not allege, a racially discriminatory impact within the meaning of the Equal Protection Clause or the Fifteenth Amendment. Appellants do not and cannot complain that white voters in North Carolina are "fenced out" of the political process or that white voters' electoral strength has been cancelled out in North Carolina by the districting plan adopted or that their influence on the political process will be consistently degraded in comparison to that of minority voters.[12] *See UJO,* 430 U.S. at 165 (plurality opinion); *id.* at 179-80 (Stewart, J., concurring); *Davis v. Bandemer,* 478 U.S. at 132, 138-40 (plurality opinion) (political gerrymandering).

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[12] As the district court observed, North Carolina's "plan demonstrably will not lead to proportional underrepresentation of white voters on a statewide basis," citing *UJO* at 430 U.S. 166 (plurality opinion). J.S. App. at 23a-24a. The dissent suggests that a statewide comparison is inappropriate. J.S. App. at 45a-47a. What the dissent ignores is that the subject of this litigation is a statewide plan and that appellants challenge the entire plan, not simply one or two districts. In *UJO* the challenge was only to districts in a single county, yet the plurality made a statewide comparison there. In contrast, the *only* relevant comparison in North Carolina is a statewide one. *See also Shayer v. Kirkpatrick,* 541 F. Supp. 922, 930 n. 7 (W.D. Mo.) (three-judge court), *aff'd mem.*, 456 U.S. 966 (1982) (comparing percentage of black majority districts to percentage of black population *statewide* to determine whether white voting strength would be cancelled out by creating black majority district).

A voter cannot complain simply because he is in the minority in a district. Two of the five appellants live in a majority-minority district. Yet, as white voters in a majority-minority district, they will have the same rights as all other voters to register, to vote, to support candidates of their choice, to join political parties, and otherwise to participate in the political process. *Cf. Anne Arundel County v. State Administrative Board of Election Laws,* 781 F. Supp. 394, 401 (D. Md. 1991) (three-judge court), *aff'd mem.*, ____ U.S. ___, 112 S. Ct. 2269 (1992). The election of a minority representative to Congress would not violate these appellants' rights any more than the rights of minorities are automatically violated when they are placed in districts with majority white populations and represented by white Congresspersons. "[T]he individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote." *UJO,* 430 U.S. at 166 (plurality opinion). "An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Davis v. Bandemer,* 478 U.S. at 132 (plurality opinion). Absent a showing that white voters have been fenced out of the process or that their voting strength has been deliberately cancelled out or consistently degraded through the redistricting process, the fact that some white voters may be represented by minority Congresspersons in majority-minority districts is not a cognizable "injury" to anyone. *See Whitcomb v. Chavis,* 403 U.S. 124, 149-153 (1971).

Appellants have suggested to this Court no constitutionally recognized adverse racial impact suffered by them because of the creation of two majority-minority districts. Indeed, it is difficult to see how appellants have stated any particular "injury" to themselves any more than minority citizens can automatically assert "injury" by the creation of white majority districts. True, neither the Constitution nor the Voting Rights Act guarantees proportional representation, but neither do they forbid it. North Carolina's deliberate creation of two majority-minority districts (and ten majority-white districts) does not in and of itself establish an adverse impact upon these appellants, who have alleged no impediment to their full participation in the political process.

Appellants have advanced no cogent reasons why the Court should note probable jurisdiction. The district court correctly rejected appellants' fourteenth and fifteenth amendment claims, and its judgment should be summarily affirmed by this Court.

II. ARTICLE I, SECTION 2 IS AN EQUAL POPULATION REQUIREMENT AND DOES NOT PROSCRIBE THE DRAWING OF DISTRICTS ON A RACE-CONSCIOUS BASIS.

Article I, section 2 has previously been construed solely as an equal population requirement and has never been extended to proscribe the drawing of congressional districts on a race-conscious basis. Citing no authority for the proposition, appellants ask this Court to expand the scope of article I, section 2 to buttress their claim of unconstitutional racial gerrymandering.

Article I, section 2 of the Constitution provides that "[t]he House of Representatives shall be composed every second year by the people of the several states." From these words appellants attempt to advance a theory that "the people" is a "unifying" concept and that this constitutional provision, as modified by section 2 of the Fourteenth Amendment, prohibits the drawing of districts on a race-conscious basis. J.S. at pp. 19-20.

As recognized by the entire three-judge court, appellants' claim under article I, section 2 is contrary to the settled precedent interpreting that clause. J.S. App. at 15a-16a; *id.* at 29a-30a (Voorhees, concurring). Under prior decisions of this Court, the clause has been confined to an equal population requirement. *See Mahan v. Howell*, 410 U.S. 315, 322 (1973) ("population alone . . . the sole criterion of constitutionality in congressional redistricting under Article I, § 2"); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (Article I, section 2 requires congressional districting within an individual state to conform to the one-person, one-vote standard). This Court has summarily affirmed the rejection by lower courts of any attempts to read additional requirements into the clause in light of the provision's limited equal protection function. *See, e.g., Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. at 397 (Article I, section 2's protection confined to one-person, one-vote principle); *Badham v. March Fong Eu*, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988) (three-judge court), *aff'd mem.*, 488 U.S. 1024 (1989) (Supreme Court "has made it clear that Article I, Section 2 only proscribes districts of unequal population").

Appellants advance no reasons why this Court should depart from established precedent to expand the scope of article I, section 2 to reach a racial gerrymandering claim. The complaint's attack on race-conscious districting gains nothing in validity by being labelled an article I rather than a fourteenth and fifteenth amendment claim.

Appellants do not challenge the population equality of North Carolina's congressional redistricting plan, and the district court properly held that appellants failed to state a claim under article I, section 2 of the Constitution.

III. THE NORTH CAROLINA LEGISLATURE'S AUTHORITY UNDER ARTICLE I, SECTION 4 TO CREATE CONGRESSIONAL DISTRICTS IS SUBJECT TO OVERRIDE BY CONGRESS.

The North Carolina legislature's authority under article I, section 4 to create congressional districts is subject to Congress's override power, which in this instance has been exercised through the Voting Rights Act. Article I, section 4 provides that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Appellants' apparent claim is that this clause reserves to the state legislature the authority to draw congressional districts without federal interference and denies to Congress, or to persons acting pursuant to federal legislation, the authority to impose what appellants allege is a "system of

proportional representation by race in the United States House of Representatives." Complaint ¶¶ 25, 27, J.S. App. at 86a-88a.

Appellants have never cited any authority for their proposition, which the district court characterized as a "novel claim in voting rights jurisprudence." J.S. App. at 14a. The district court unanimously declined to recognize appellants' claim under article I, section 4.[13] J.S. App. at 14a-15a; *id.* at 29a-30a (Voorhees, concurring). On its face, this provision is simply a grant of power to the states to "prescribe" their own voting procedures. However, the clause also explicitly subjects the states' authority to congressional override of any election procedures, except for the "Place of chusing Senators," which is not relevant here. The Voting Rights Act is just such an exercise of the congressional override power and validates the state's redistricting actions taken to comply with the requirements of the Act. As cogently explained by the district court, article I, section 4 does not impose any structural limitations on the state's power to prescribe electoral processes or on Congress's override power of control. *See* J.S. App. at 14a-15a. Whatever constitutional limits may exist to constrain the state's or Congress's consideration of race in the redistricting process, they do not arise from article I, section 4. Appellants' racial gerrymandering claim more properly falls under

[13] Apparently conceding that article I, section 4 does not support a free-standing constitutional claim of racial gerrymandering, appellants in their Jurisdictional Statement couple the clause to the Fifteenth Amendment. *See* J.S. at pp. 21-22.

the Fourteenth and Fifteenth Amendments. The appellants' contentions under this clause present the Court no basis for noting probable jurisdiction.

CONCLUSION

The state appellees respectfully submit that the questions upon which this case depends are so unsubstantial as not to need further argument. Therefore, the state appellees move the Court to affirm summarily the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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